



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E047 OF 2021

IN THE MATTER OF PUBLIC INTEREST LITIGATION UNDER ARTICLE 3(1),

22, 23, 48, 50(1), 258 AND 259(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED THREATS OF ARTICLES 1(1), 2(1)-(4),

3(1), 4(2), 10(1)&(2), 19, 20, 21, 24, 129, 131(2)(a), 153(4)(a), 201(a) & (d), 231(1)(b),

(d), (e), & (f) and 259(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED THREATS TO COUNTY GOVERNMENT

WORKERS RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE

40 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF SECURING SOME KSHS. 120 BILLION OF THE COUNTY
GOVERNMENT WORKERS PENSION FUNDS AND THE IMPLEMENTATION OF**

THE COUNTY GOVERNMENT RETIREMENT SCHEME (CGRC) ACT 2019

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

JANE WANJIRU MACHARIA.....PETITIONER

VERSUS

COUNCIL OF GOVERNORS.....1ST RESPONDENT

THE COUNTY PENSION FUND.....2ND RESPONDENT

THE COUNTY PENSION FUND

FINANCIAL SERVICES.....3RD RESPONDENT

COUNTY GOVERNMENT OF KILIFI.....4TH RESPONDENT

COUNTY GOVERNMENT OF TANA RIVER.....5TH RESPONDENT

COUNTY GOVERNMENT OF LAMU.....6TH RESPONDENT

COUNTY GOVERNMENT OF TAITA/TAVETA.....7TH RESPONDENT

COUNTY GOVERNMENT OF GARISSA.....8TH RESPONDENT

COUNTY GOVERNMENT OF WAJIR.....9TH RESPONDENT

COUNTY GOVERNMENT OF MANDERA.....10TH RESPONDENT

COUNTY GOVERNMENT OF MARSABIT.....11TH RESPONDENT

COUNTY GOVERNMENT OF ISIOLO.....12TH RESPONDENT

COUNTY GOVERNMENT OF MERU.....13TH RESPONDENT

COUNTY GOVERNMENT OF THARAKA-NITHI.....14TH RESPONDENT

COUNTY GOVERNMENT OF EMBU.....15TH RESPONDENT

COUNTY GOVERNMENT OF KITUI.....16TH RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS.....17TH RESPONDENT

COUNTY GOVERNMENT OF MAKUENI.....18TH RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA.....19TH RESPONDENT

COUNTY GOVERNMENT OF NYERI.....20TH RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA.....21ST RESPONDENT

COUNTY GOVERNMENT OF MURANG'A.....	22 ND RESPONDENT
COUNTY GOVERNMENT OF KIAMBU.....	23 RD RESPONDENT
COUNTY GOVERNMENT OF TURKANA.....	24 TH RESPONDENT
COUNTY GOVERNMENT OF WEST POKOT.....	25 TH RESPONDENT
COUNTY GOVERNMENT OF SAMBURU.....	26 TH RESPONDENT
COUNTY GOVERNMENT OF TRANS-NZOIA.....	27 TH RESPONDENT
COUNTY GOVERNMENT OF UASIN GISHU.....	28 TH RESPONDENT
COUNTY GOVERNMENT ELGEYO-MARAKWET.....	29 TH RESPONDENT
COUNTY GOVERNMENT OF NANDI.....	30 TH RESPONDENT
COUNTY GOVERNMENT OF BARINGO.....	31 ST RESPONDENT
COUNTY GOVERNMENT OF LAIKIPIA.....	32 ND RESPONDENT
COUNTY GOVERNMENT OF NAKURU.....	33 RD RESPONDENT
COUNTY GOVERNMENT OF NAROK.....	34 TH RESPONDENT
COUNTY GOVERNMENT OF KAJIADO.....	35 TH RESPONDENT
COUNTY GOVERNMENT OF BOMET.....	37 TH RESPONDENT
COUNTY GOVERNMENT OF KAKAMEGA.....	38 TH RESPONDENT
COUNTY GOVERNMENT OF VIHIGA.....	39 TH RESPONDENT
COUNTY GOVERNMENT OF BUNGOMA.....	40 TH RESPONDENT
COUNTY GOVERNMENT OF BUSIA.....	41 ST RESPONDENT
COUNTY GOVERNMENT OF SIAYA.....	42 ND RESPONDENT
COUNTY GOVERNMENT OF KISUMU.....	43 RD RESPONDENT
COUNTY GOVERNMENT OF HOMA BAY.....	44 TH RESPONDENT
COUNTY GOVERNMENT OF MIGORI.....	45 TH RESPONDENT
COUNTY GOVERNMENT OF KISIL.....	46 TH RESPONDENT

COUNTY GOVERNMENT OF NYAMIRA.....47TH RESPONDENT

COUNTY GOVERNMENT OF NAIROBI CITY.....48TH RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....49TH RESPONDENT

COUNTY GOVERNMENT OF KWALE.....50TH RESPONDENT

AND

LOCAL AUTHORITIES PROVIDENT

FUND (LAPFUND).....1ST INTERESTED PARTY

LOCAL AUTHORITIES PENSIONS

TRUST (DEFINED BENEFITS)

SCHEME (LAPTRUST).....2ND INTERESTED PARTY

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 6th April 2021 seeking to be heard for Orders:

1) *Spent.*

2) *THAT the 1st Respondent (Council of Governors) be restrained from unduly, unilaterally as well as arbitrarily interfering with the operations, remittances, contributions and/or rates of the existing Pension and/or Provident schemes at the Local Authorities and/or County Levels and in particular the 1st and 2nd Respondent and/or from stopping any remittances from the County Governments to the 1st and 2nd Interested Party pending the hearing and determination of this application.*

3) *THAT an injunction be and is hereby allowed precluding the 1st, 2nd and 3rd Respondents whether acting directly or through its agents, third parties, proxies, servants, subordinates and/or successors from doing any of the following things pending service, hearing and determination of this Application, namely:*

a. Making adverts and/or other publications that misrepresent the 2nd and 3rd Respondents as the Superior Scheme.

b. Transferring any members of the 1st and 2nd Interested Parties from their existing schemes to the 2nd and 3rd Respondents Pension Funds and/or scheme.

c. Implementing any directive from the 1st Respondent directing them to remit any pension funds to the 2nd and 3rd Respondents.

d. Usurping the mandate and powers of the County Public Service Board who are charged with determining pension for employees of the county.

4) *THAT the 1st Respondent (Council of Governors) be restrained from unduly, unilaterally as well as arbitrarily interfering with the operations, remittance, contributions and/or at the County Levels and in particular to the 1st and 2nd Interested Party pending the hearing and determination of the Petition.*

5) THAT an injunction be and is hereby allowed precluding the 1st, 2nd and 3rd Respondents whether acting directly or through its agents, third parties, proxies, servants, subordinates and/or successors from doing any of the following things pending service, hearing and determination of this Petition, namely:

- a. Making adverts and/or other publications that misrepresent the 2nd and 3rd Respondents as the superior Scheme.
- b. Transferring any members of the 1st and 2nd Interested Parties from their existing schemes to the 2nd and 3rd Respondents Pension Funds and/or scheme.
- c. Implementing any directive from the 1st Respondent directing them to remit any pension funds to the 2nd and 3rd Respondents.
- d. Usurping the mandate and powers of the County Public Service Board who are charged with determining pension for employees of the county.

6) THAT the Respondents bear the costs of this Application.

7) Any other orders that the Court may deem fit.

2. The Application is based on the grounds that the Applicant is a County Government worker and a member of the 1st Interested Party. The Applicant is highly aggrieved by a Resolution by the 1st Respondent as per the letter dated 18th January 2021, directing County Governments unilaterally, arbitrarily and without a colour of right not to remit contributions to the 1st Interested Party and/or not to remit the Contributions at the current rates. That notably, the contributions made by workers and the County Governments to the 1st and 2nd Interested Parties are not gratuitous but in fulfilment of peremptory statutory and contractual obligations geared at benefitting the County Government workers. That therefore the non-remittance of contributions by County Governments will occasion the said workers grave prejudice and a serious miscarriage of justice. The Applicant in a nutshell contends that the apparent interference by the 1st Respondent with the remittances to the 1st Interested Party is unprocedural, unconstitutional, illegal, arbitrary, ultra vires, untoward, unreasonable, rash and manifestly unjust hence necessitating the potent intervention of this Honourable Court. The Applicant asserts that in addition, the 1st Respondent has no capacity to deal with human resource matters including selecting a pension scheme for the county employees and that together with matters of social welfare, traverse both the public frontier and the contractual arena and cannot thus be addressed in the rash manner taken by the 1st Respondent. That unless the orders sought are granted, the Applicant and the thousands of County Government workers stand to suffer immense prejudice and indeed irreparable harm.

3. In the Supporting Affidavit, the Petitioner/Applicant avers that at all material times in her employment, she has without any interruption contributed to the 1st Respondent through her salary deductions and subsequent remittances by her employer, the County Government of Murang'a. That the said directive by the 1st Respondent is intended to unduly interfere with the operations of the 1st and 2nd Interest Parties and compel County Government workers to join one umbrella Scheme renamed to the County Pension Fund. She contends that County Government workers were never consulted when in fact it is their retirement benefits the 1st Respondent is dicing with and placing at great risk and uncertainty and that the said directive and resolutions were made with finality.

4. The 1st Respondent filed a Replying Affidavit sworn on 31st May 2021 by its CEO, Jacqueline Mogeni who depones that the issues in question are being litigated in **ELRC Nairobi Petition No. 230 of 2019 (Consolidated with Petitions Nos. 213 and 222 of 2019: The Local Authorities Pensions Trust Board of Trustees & Others vs Attorney General & Others**, which is currently pending hearing and determination before the Honourable Lady Justice Maureen Onyango. That the Petition and the attendant Application are thus *sub judice* and cannot be considered without prejudicing the proceedings in other courts or embarrassing those other courts. It is her averment that the Petitioner has not established a case for the grant of the conservatory orders sought which if granted will have a negative effect on the functioning of the Counties.

5. The 2nd Respondent and the 2nd Interested Party also filed a Replying Affidavit sworn on 5th May 2021 by the Secretary of the Boards of Trustees of the 2nd Respondent and the 2nd Interested Party, Kimutai Hosea. He depones that the Application and the Petition offend the doctrines of *res judicata* and *sub judice* to the extent that the matter directly and substantially in issue being the appropriate pension arrangements for county government workers, ought to have been raised/or to be raised in: **ELRC Nairobi Civil**

Cause No. 107 of 2015: Evans Wafula Makokha & Another v Council of Governors & 2 Others which was struck out for want of prosecution on 9th June 2018; **ELRC Nairobi Petition No. 53 of 2015 (previously, High Court (Nairobi) Petition No. 599 of 2014): Evans Wafula Makokha & Another v Council of Governors & 6 Others** which was struck out for want of prosecution on 9th June 2018; or **ELRC Nairobi Petition No. 230 of 2019 (Consolidated with Petitions Nos. 213 and 222 of 2019: The Local Authorities Pensions Trust Board of Trustees & Others v Attorney General & Others**, currently pending before the Honourable Lady Justice Maureen Onyango. He further avers that the Application is an abuse of the court process considering the Petitioner has likely been sponsored by Lapfund to file the suit herein without any or any reasonable justification and he urges the Court to dismiss the Application with costs.

6. The 3rd Respondent filed a Replying Affidavit sworn on 4th May 2021 by its Group Company Secretary and Head of Legal Services, Mitei Isaac who depones that the 3rd Respondent is not a Pension Scheme capable of benefiting from the alleged Circular of 18th January 2021. Further, that there is no cause of action which has been established as against the 3rd Respondent and that this Honourable Court lacks jurisdiction to handle the Petition herein. He avers that the application is fatally defective as it does not state the provisions of the law it is expressed to have been brought and that the orders sought cannot therefore be granted.

7. Petitioner/Applicant's Submissions

The Petitioner/Applicant submits that the actions of the Respondents herein with regards to the Local Authorities Provident Fund were not only out of their scope but also *ultra vires* and should not be considered or given effect. To this end she relies on various authorities namely, **Judicial Review Application No. 43 of 2018, Republic v Secretary of the Firearms Licensing Board & 2 Others, Ex parte Senator Johnson Muthama [2018] eKLR** and **Miscellaneous Civil Application 437 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Nairobi City & Sewerage Company; Web Tribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR**. She submits that she, as a county government worker, is statutorily obligated to ensure contributions to the Local Authorities Providence Fund as provided for under Section 8(1) of the Local Authorities Provident Fund Act (Cap 727) Laws of Kenya. It is her submission that the Respondents ought to not only be estopped from any furtherance in acts outside their scope and or mandate, but should also cater for any accruals of funds arising from the non-payment of the Local Authorities provident fund. On the issue that the Respondents should have made prior consultation, she relies on the case **Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR** where Odunga J. (as he then was) defined what public participation entails. The Petitioner/Applicant submits that this Honourable Court ought to allow in its entirety the Application dated 6th April 2021 with costs in favour of the Petitioner and any other issues raised by the Respondents be determined at trial.

8. Submissions by the 2nd Respondent and 2nd Interested Party

The 2nd Respondent and the 2nd Interested Party submit that this Honourable Court has no jurisdiction to entertain the Petition and the Application because they offend the doctrine of *sub judice* as pleaded in their Replying Affidavit. That the Court in **Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR**, stated that "... in determining whether or not the rule on *sub judice* applies, it is the substance of the claim that ought to be looked at rather than the prayers sought...". They further submit that the Petitioner/Applicant has not met the legal thresholds for granting the reliefs sought in the Application and is therefore not deserving of the Orders/ declarations sought.

9. The application and Petition are said to be bound by the doctrine of *res judicata* and the rule against *sub judice*. There is an indication that there is a pending action where the matters herein are directly and substantially in issue. The suits comprised in **ELRC Nairobi Petition No. 230 of 2019 (Consolidated with Petitions Nos. 213 and 222 of 2019: The Local Authorities Pensions Trust Board of Trustees & Others vs Attorney General & Others** are pending before the Hon. Lady Justice Maureen Onyango the Principal Judge of this Court. The term *sub judice* is Latin for the concept that where an issue is pending in a court of law for adjudication between the same parties, other courts are barred from trying that issue. The term '*sub-judice*' is defined in **Black's Law Dictionary Tenth Edition** as: "*Before the Court or Judge for determination.*" The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. In this case there are a multiplicity of suits on the same issues some of which have been consolidated. As these suits are pending determination and granted the indication the parties are similar save for the Petitioner herein, the suit shall be stayed pending the determination of the Petitions and causes between the Respondents and Interested Parties before the Principal Judge. Application dismissed with no order as to costs

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2021

Nzioki wa Makau

JUDGE



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